

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

AMEREN ILLINOIS COMPANY)	
)	Docket No. 11-0279
Proposed general increase in electric delivery)	
service rates.)	
)	(Cons.)
)	
AMEREN ILLINOIS COMPANY)	
)	Docket No. 11-0282
Proposed general increase in gas delivery service)	
rates.)	

**RESPONSE OF THE PEOPLE OF THE STATE OF ILLINOIS
TO THE CITIZENS UTILITY BOARD MOTION TO STRIKE**

The People of the State of Illinois (“the People” or “AG”), by and through Lisa Madigan, Attorney General of the State of Illinois, pursuant to 83 Ill. Adm. Code Sec. 200.190 and the ruling given by the Administrative Law Judges on October 14, 2011, hereby provide their Response to the Citizens Utility Board (“CUB”) Motion to Strike (“Motion” or “CUB’s Motion”) certain portions of the Illinois Competitive Energy Association (“ICEA”) Initial Brief filed on October 11, 2011 for this captioned case. In support of the Motion, the People state as follows:

1. The Public Utilities Act (“PUA” or the “Act”) and the Illinois Administrative Procedure Act (the “APA”) both specifically require that findings shall be based exclusively on the record evidence for decision in the case. ICEA’s Initial Brief, however, inappropriately adds facts unsupported and un-cited by the record for decision, in violation of 10-103 of the PUA and Section 10-35 of the APA. 220 ILCS 5/10-103; 5 ILCS 100/10-35.
2. Accordingly, CUB’s Motion requests certain portions of ICEA’s Initial Brief be stricken from the record. For example, ICEA states that:

...recent events with regard to the competitive retail electric market and the discovery of large shale plays in the Midwest have changed the retail gas markets to the point where ICEA believes the Ameren Illinois consumers would see benefits from multiple supplier offers.

ICEA Initial Brief at 3.

There is no citation to the record regarding the discovery of large shale plays in the Midwest. Also, there is no nexus to how “large shale plays in the Midwest” would lead to customer “benefits from multiple supplier offers.”¹ Since the statement regarding shale gas evidence was not presented by ICEA, or anyone else for that matter, there was no opportunity for any party or Staff to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. Instead, ICEA attempts to present a bald statement as fact during the briefing period.

3. In another example, ICEA’s Initial Brief addresses retail suppliers’ economies of scale and states:

Unlike utilities, retail suppliers have the ability to leverage economies of scale between customers throughout the Midwest by utilizing **storage assets** in the region along with local **production contracts** and **spot market purchases**. ICEA maintains that retail suppliers offer customers the ability to obtain the best price for their gas usage.

ICEA Initial Brief at 5. (emphasis added).

Once again, there is no citation to the record. Even if the assertion that, “retail suppliers have the ability to leverage economies of scale” and utilities do not have this same ability, was true (and the People believe it is not true)² this issue was not presented by ICEA or any other party, there is no citation to the record, there was no opportunity for

¹ The Commission’s rules of evidence at 83 Ill. Code Part 200.610 (a) states, “*In all proceedings subject to this Part, irrelevant, immaterial or unduly repetitious evidence shall be excluded.* [5 ILCS 100/10-40]”

² Ameren Illinois provides electric delivery service to approximately 1.2 million customers and gas delivery service to approximately 840,000 customers. Ameren Initial Brief at 6.

any party or Staff to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.

4. The demands of due process apply in full to administrative proceedings. *People ex. rel. Ill. C.C. v. Operator Comm'n, Inc.*, 281 Ill. App. 3d 297, 302 (1st Dist. 1996).

Regulatory agencies, such as the Commission, must base their decisions upon evidence introduced in the case. *Id.* According to *Novosad v. Mitchell*, 251 Ill. App. 3d 166, 174 (4th Dist. 1993):

An administrative agency cannot base its decision upon facts, data, and testimony which do not appear in the record. [F]indings must be based on evidence introduced in the case, and nothing can be treated as evidence which is not introduced as such because due process of law requires that all parties have an opportunity to cross-examine witnesses and to offer evidence in rebuttal.

(internal citations removed); *see also Dombrowski v. City of Chicago*, 363 Ill. App. 3d 420, 426 (1st Dist. 2005) (“Due process requires that all parties have an opportunity to cross-examine witnesses and offer rebuttal evidence.”); *Peoria Disposal Co. v. Ill. Pollution Control Bd.*, 385 Ill. App. 3d 781, 797 (3d Dist. 2008) (At a minimum, due process requires “the right to cross examine adverse witnesses, and the right to have impartial rulings on the evidence.”).

5. As well, The PUA and the APA require that findings shall be based exclusively on the record for decision. Accordingly, Section 10-103 of the Act mandates that:

In all proceedings, investigations or hearings conducted by the Commission, except in the disposition of matters which the Commission is authorized to entertain or dispose of on an ex parte basis, **any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case**, which shall include only the transcript of testimony and exhibits together with all papers and requests filed in the proceeding, including, in contested cases, the documents and

information described in Section 10-35 of the Illinois Administrative Procedure Act.

220ILCS 5/10-103 (emphasis added).

Likewise, Section 10-35 of the APA enumerates those findings that constitute the record for decision and states, “findings of fact shall be based **exclusively** on the evidence and on matters officially noticed.” 5 ILCS 100/10-35 (emphasis added). Thus, it is against the PUA and the APA for ICEA’s Initial Brief to attempt to discuss and argue statements asserting unsupported and un-cited facts as identified in the CUB Motion.

6. Illinois Courts have long held that findings of the Commission must be based solely on the record of “evidence” in the proceeding. *Business & Prof. People for the Public Interest v. Illinois Commerce Comm’n*, 136 Ill. 2d 192, 227 (1989). The Illinois Supreme Court explained, “that the commissioners are not allowed to act on their own information but must base their findings on evidence present in the case.” *Island Lake Water Co. v. Illinois Commerce Comm’n*, 65 Ill. App. 3d 853, 859 (Ill. App. Ct. 1978) (“*Island Lake Water*”). The Commission’s decision is thus limited to the record for decision. *Moline Consumers’ Co. v. Illinois Commerce Comm’n*, 353 Ill. 119, 129 (Ill. 1933), *Fleming v. Illinois Commerce Comm’n*, 388 Ill.138, 149 (1944) quoting *Atchison, Topeka & Santa Fe Railway Co. v. Illinois Commerce Comm’n*, 335 Ill. 624 (Ill. 1929).

In other words, the Court held:

Commission . . . findings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such.

Fleming v. Illinois Commerce Comm’n, 388 Ill.138, 149 (1944).

Nowhere, however, under either the Act, the APA or under the Commission rules are the facts in ICEA's Initial Brief as identified in CUB's Motion facts on which the Commission may rely upon in reaching a decision.

CONCLUSION

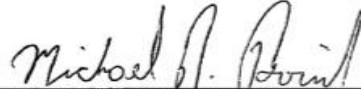
For the reasons discussed herein as well as in CUB's Motion, the AG respectfully requests that the following unsupported and un-cited statements of fact found in ICEA's Initial Brief as identified by CUB should be stricken:

- Page 1, first paragraph, third sentence, beginning with "The ICEA's members..."
- Page 3, first paragraph, fifth sentence, beginning with "ICEA points out..."
- Page 3, second paragraph, second through fourth sentences, beginning with "It is not reasonable" and ending with "Apple iPod."
- Page 4, first full paragraph, second through seventh sentences beginning with "Section 19-115..." and ending with "...these issues continue to exist today."
- Page 5, heading 4 "Economic benefits potentially available through dual fuel offers..." and the paragraph below the header, beginning with "Many members..." and ending with "...natural gas choice."
- Page 5, second paragraph, third through fourth sentences, beginning with "Unlike utilities..." and ending with "...best price for their gas storage [sic]."
- Page 5, last sentence (continuing on to page 6) through page 6 first full sentence, beginning with "Many possibilities..." and ending with can become a reality."

Motion at 2-3.

Respectfully submitted,

People of the State of Illinois
By Lisa Madigan, Attorney General

A handwritten signature in dark ink, appearing to read "Michael R. Borovik", is written over a horizontal line.

Janice Dale
Chief, Public Utilities Bureau
Michael R. Borovik
Assistant Attorney General
Public Utilities Bureau
Illinois Attorney General's Office
100 West Randolph Street, 11th Floor
Chicago, Illinois 60601
Telephone: (312) 814-7203
Facsimile: (312) 814-3212
jdale@atg.state.il.us
mborovik@atg.state.il.us

Date: October 18, 2011